15

No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL, AND DAVID RICHTER,

Petitioners,

v.

CURTIS W. McGHEE JR. AND TERRY J. HARRINGTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... v

INTEREST OF AMICI CURIAE..... 2

SUMMARY OF ARGUMENT..... 4

ARGUMENT

I. AS A MATTER OF POLICY AS WELL AS PRECEDENT, ABSOLUTE IMMUNITY SHOULD NOT BE EXTENDED TO SHIELD FROM CIVIL LIABILITY PROSECUTORS WHO FUNCTION SIDE BY SIDE WITH POLICE DETECTIVES DURING THE INVESTIGATION OF A CRIME TO FRAME A 'SUSPECT' BY FABRICATING 'EVIDENCE' AND THEN GIVE THAT 'EVIDENCE' ITS INTENDED USE BY INTRODUCING IT AT A CRIMINAL TRIAL..... 9

TABLE OF CONTENTS
(continued)

Page

A. *Buckley v. Fitzsimmons*, 509 U.S.259 (1993), Controls the Absolute Immunity Question Presented by This Case..... 9

B. Petitioner Has Failed to Demonstrate Any Need for the Application of Absolute Immunity To Protect Prosecutors Who Assist, Advise, Or Supplant Police In Fabricating Evidence During a Criminal Investigation and Then Utilize That Same Evidence to Prosecute or Convict An Innocent Criminal Defendant..... 15

1. Qualified Immunity Suffices..... 15

TABLE OF CONTENTS
(continued)

Page

2. Experience Since *Imbler* Proves That There Are No Effective Alternatives to § 1983 Liability for Deterring Investigative Misconduct by Prosecutors..... 19

II. PETITIONERS DO NOT ENJOY QUALIFIED IMMUNITY FOR FABRICATING EVIDENCE DURING THE INVESTIGATIVE STAGE MERELY BECAUSE THEY, INSTEAD OF ANOTHER PROSECUTOR, PRESENTED THAT EVIDENCE AT TRIAL..... 40

CONCLUSION..... 44

TABLE OF AUTHORITIES

Cases *Page*

Anderson v. Creighton, 483 U.S. 635 (1987)..... 12

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)..... 16

Banks v. Dretke, 540 U.S. 668 (2004).....30, 31

Bd. of County Comm'rs v. Brown, 520 U.S. 397 (1997)..... 16

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)..... *passim*

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County of Sacramento v. Lewis, 523 U.S. 833 (1998)..... 14

Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001)..... 16

Forrester v. White, 484 U.S. 219 (1988)..... 12

TABLE OF AUTHORITIES
(continued)

Page

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Kalina v. Fletcher, 522 U.S. 118 (1997).....9, 11, 22

Malley v. Briggs, 475 U.S. 335 (1986)..... 7, 8, 12

Michaels v. McGrath, 222 F.3d 118, (3d Cir. 2000)..... 16

Owens v. City of Independence, 445 U.S. 622 (1980)..... 10

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TABLE OF AUTHORITIES
(continued)

Page

Ramos v. City of New York, 729 N.Y.S.2d 678 (N.Y. App. Div. 1st Dept. 2001)..... 30

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TABLE OF AUTHORITIES
(continued)

Page

Constitutional and Statutory Provisions

United States Code

Title 18, Section 3500..... 43

Title 42, Section 1983..... *passim*

CA. Penal L.

Section 4900-4906..... 38

Ill. Comp. Stat.

Section 505/8(c)..... 38

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TABLE OF AUTHORITIES
(continued)

Page

MD Code Ann. State & Fin. Proc.
Section 10-501(b)..... 38

Me. Rev. Stat. Ann.

tit. 14 MSRA Section 8241..... 38

N.C. Gen. Stat.

Section 148-82..... 38

N.J. Stat. Ann.

Section 52:4C-I..... 38

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Section 8-b..... 38, 39

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Section 103.001(4)..... 38

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Section 14-2-13a..... 38

TABLE OF AUTHORITIES
(continued)

Page

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(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

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(continued)

Page

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BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE CATO INSTITUTE, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), the Cato Institute, and the American Civil Liberties Union ("ACLU") as *amici curiae* in support of Respondents, with the written consent of the parties.[1]

INTEREST OF AMICI CURIAE

The NACDL is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice. Nothing is more central to the fairness and the integrity of the

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[1] As required by Rule 37.6 of this Court, *amici curiae* submit that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

criminal justice system than the right, which is at the heart of this case, not to have false evidence manufactured by law enforcement officials for the purpose of depriving citizens of their fundamental right to liberty.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. Cato is interested in this particular case because it implicates the remedies citizens have when government officials acting under color of law violate their constitutional rights.

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Iowa is one of its statewide affiliates. Since its founding in 1920, the ACLU has been committed to ensuring the fairness and integrity of the criminal justice system,

and to providing meaningful redress for those whose rights are violated. In furtherance of that goal, the ACLU has been involved in numerous cases before this Court interpreting the scope of official immunities.

SUMMARY OF ARGUMENT

In 1977, the Petitioners in this case, David Richter and Joseph Hrvol, worked side by side with police to investigate the notorious murder of a former police officer in Pottawattamie County, Iowa. At the time, Richter was county attorney and seeking re-election to that position; Hrvol was an assistant county attorney. Anxious to "solve" the crime, Petitioners participated in fabricating evidence against Respondents, who were 16 years old, and then used the evidence to charge and convict them. After Respondents spent 25 years in prison, their convictions were overturned based on Petitioners' prosecutorial misconduct. Petitioners now advance a series of "policy" arguments for why this Court should abandon its oft-expressed reluctance to expand absolute immunity and protect all prosecutors from § 1983 liability for intentionally causing witnesses to fabricate testimony – so long as it is the same prosecutors who later use that testimony at trial. Such a result would deeply *offend* public policy concerns and the Constitution, not serve them.

1. This Court has held that prosecutors are only entitled to qualified immunity when they perform an investigatory function. Here, there is no doubt that Petitioners were acting in an investigatory capacity when they fabricated evidence against Respondents. Nevertheless, Petitioners seek to avoid liability for their investigatory misconduct by arguing that there is no constitutional violation until the fabricated evidence is used at trial, and that a prosecutor may not be sued for the use of fabricated evidence at trial because a prosecutor's decisions are shielded by absolute immunity. Proceeding from that premise, Petitioners then assert that their absolute prosecutorial immunity relates back to their earlier investigatory decision to fabricate probable cause as a basis for Respondents' arrests. That approach turns immunity analysis upside down. Under this Court's jurisprudence, the question of whether absolute or qualified immunity applies is a functional one and necessarily precedes the question of whether or not a constitutional violation has occurred. Petitioners, by contrast, attempt to merge the two inquiries in an effort to stretch absolute immunity beyond anything this Court has ever authorized.

2. As the courts below correctly held, the absolute immunity question presented by this case is controlled by this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), which also

involved the manufacturing of false evidence by a prosecutor during the investigative phase. That the prosecutors in this case also were the ones to utilize such evidence at trial cannot be related backwards to retroactively immunize their earlier misconduct. This fact at most relates to the viability of Respondents' constitutional claim seeking to hold Petitioners liable for their investigative misconduct.

Petitioners attempt to avoid the controlling logic of *Buckley* by instead focusing on various policy concerns that they contend warrant recognizing absolute immunity in this case, but they utterly fail to overcome the applicable *presumption*, *see Burns v. Reed*, 500 U.S. 478, 486-87 (1991), that qualified immunity suffices.

First, Petitioners' concept of absolute immunity sweeps far too broadly and would have the perverse effect of relieving investigatory prosecutors from liability for intentional and outrageous misbehavior that *should be* deterred. Qualified immunity has proven entirely adequate to preserve the ability of law enforcement to vigorously investigate criminal activity without being chilled by the fear of personal liability. It is no less adequate for prosecutors. For both police and prosecutors performing an investigatory role, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law."

Burns v. Reed, 500 U.S. at 494-95 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Petitioners and their *amici* supply no evidence that lawsuits for investigative misconduct by prosecutors are common – they cite 11 over 33 years – and no basis to conclude that prosecutors have been or will be deterred by fear of them. Nor do they show that the few such lawsuits that get past qualified immunity and pleading requirements will be any more distracting to prosecutors than far more common collateral attacks on convictions or the serious inquiries by disciplinary bodies that they argue would adequately deter misconduct. Indeed, where, as here, police defendants are already named in a lawsuit, prosecutors who worked with them in allegedly fabricating evidence will have to testify and provide documents regardless of whether they are defendants or third parties, and they will be defended and indemnified by their employer in either case.

Second, the contention by Petitioners and their *amici* that there are other, better means to deter investigatory misconduct by prosecutors, such as bar or intra-office discipline, is refuted by numerous reports and studies. Petitioners cite a handful of highly notorious cases in which public exposure of extreme misconduct was followed by discipline, but the overall reality is that for each revelation of

misconduct by a prosecutor that is followed by some personal sanction, a hundred are not. Attorney disciplinary committees have a mechanism for investigating such misconduct, but typically lack the staff and the expertise; prosecutors' offices have the expertise to conduct such investigations, but rarely do so. There is far more regulation and discipline of police, by civilian and internal review boards, than there is of prosecutors who perform the same investigative functions. It would be anomalous to favor prosecutors with absolute immunity, but not police, when it is only the police who face any real alternative sanction to deter them from misconduct.

3. The Court should reject Petitioners' hyper-technical argument that Respondents have not stated a valid cause of action because it was solely Petitioners' immunized *use* of the fabricated evidence at trial that caused Respondents to suffer constitutional injury. As the Respondents convincingly argue in their brief, the fabrication of evidence for the purpose of depriving a citizen of his liberty, which then results in such deprivation, violates the due process clause of the Constitution, and is actionable under § 1983. *See, e.g., Malley v. Briggs*, 475 U.S. 335 (1986). That the fabricator elects to use the evidence himself rather than to hand it to a colleague to do his dirty work just exacerbates his own original wrongdoing; it cannot possibly relieve him of responsibility for it.

ARGUMENT

I. AS A MATTER OF POLICY AS WELL AS PRECEDENT, ABSOLUTE IMMUNITY SHOULD NOT BE EXTENDED TO SHIELD FROM CIVIL LIABILITY PROSECUTORS WHO FUNCTION SIDE BY SIDE WITH POLICE DETECTIVES DURING THE INVESTIGATION OF A CRIME TO FRAME A 'SUSPECT' BY FABRICATING 'EVIDENCE' AND THEN GIVE THAT 'EVIDENCE' ITS INTENDED USE BY INTRODUCING IT AT A CRIMINAL TRIAL

A. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), Controls the Absolute Immunity Question Presented by This Case

Section 1983 creates a damages remedy against "every state official for the violation of any person's federal constitutional or statutory rights." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). The language of the statute explicitly subjects a state official to liability not just for "subject[ing]" a citizen to a federal constitutional "deprivation," but also for "caus[ing]" such an injury. 42 U.S.C. § 1983. The statute must be broadly construed to protect persons wronged by the misuse of state power by providing

compensation and providing remedies that will deter future such misconduct. *Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980).

Nevertheless, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court held that "in initiating a prosecution and in presenting the State's case, [a] prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. The Court based this holding upon the common-law rule of immunity for *judicial* functions that presumably guided Congress when it enacted § 1983, as well as "considerations of public policy that underlie the common-law rule." *Id.* at 424. In reaching this conclusion, the *Imbler* Court assumed there were alternative ways, including professional discipline, to deter prosecutorial misconduct at trial. *Id.* at 429.

Since *Imbler*, the Court has recognized that prosecutors can and do perform different functions, and that the level of immunity that applies is determined by the role the prosecutor is playing. More specifically, the Court has made clear that prosecutors, like the police, are only entitled to *qualified* immunity when they are acting as criminal investigators. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Based on that distinction, the Court has declined to extend *Imbler* even in cases where the relationships between the challenged conduct and criminal proceedings were closer than here.

See, e.g., Burns v. Reed, 500 U.S. 478 (1991) (only qualified immunity for providing advice to police that contributes to a misleading arrest warrant application intended to bring a suspect before the court for criminal proceedings); *Buckley, supra* (only qualified immunity for obtaining a false expert opinion during a matter's investigative stage for later use at a criminal trial); *Kalina v. Fletcher*, *supra* (only qualified immunity for acting like a complainant in personally attesting to the truth of facts necessary to obtain an arrest warrant that is intended to initiate criminal proceedings). *Compare Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009) (absolute immunity for District Attorney for adopting prosecutorial policies relating to *Giglio* disclosure that solely relate to and affect how criminal trials will be conducted); *Burns v. Reed*, 500 U.S. at 492 (absolute immunity for prosecutors who present evidence in *court* in support of a search warrant application).

In analyzing the immunity question in these and other cases, the Court has "emphasized that *the official seeking absolute immunity bears the burden* of showing that such immunity is justified for the function in question [citations omitted]. The *presumption* is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," and the Court's application of absolute immunity has been "quite

sparing." *Burns v. Reed*, 500 U.S. at 486-87 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988) (emphasis added)). The Court has further cautioned: "[O]ur role is 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent in enacting § 1983. 'We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.'" *Burns v. Reed*, 500 U.S. at 493 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986), and *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)).

Any need to expand the scope of prosecutorial immunity after *Imbler* was eliminated by the Court's reformulation of the qualified immunity test soon thereafter. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court replaced the common law subjective or good-faith test for qualified immunity under § 1983 with a two part objective standard, under which a plaintiff must show *both* that the official violated a clearly-established constitutional rule of conduct *and* that no reasonably trained official in his position could have believed his conduct was lawful. As the Court recognized in *Burns*, "the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided." 500 U.S. at 494. Qualified immunity now provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley*,

475 U.S. at 341). In cases like this, where the law is clear, prosecutors who are trained in the law "should be made to hesitate." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

The absolute immunity issue that Petitioners raise is easily resolved under the Court's functional test and its application of that test in *Buckley*. Here, as in *Buckley*, the function in question was the deliberate manufacturing of false evidence during a criminal investigation, before there was any definite suspect and, once there was a suspect, before there was probable cause to believe he was guilty of the crime. The only "difference" is that in *Buckley* the false "evidence" was elicited from an expert, whereas here it was manufactured by law enforcement authorities through the coercion of vulnerable teenagers. Indeed, this case is far easier than *Buckley*, since the misconduct here began earlier in the investigation, involved fabricating false testimony to frame innocent suspects as opposed to shopping for an expert witness, and was pervasive. Petitioner Hrvol, in particular, could just as easily have been on the payroll of the Police Department as of the County Attorney, since he was assigned to *investigate* and was not assigned to prosecute when the key evidence, including Hughes' false story, was fabricated. A ruling in petitioners' favor would overrule *Buckley* or eviscerate it.

Petitioners contend that this case is different than *Buckley* because here the same prosecutors who manufactured the false evidence were involved in using it at trial to harm Respondents. They take the liberty of reformulating Respondents' claim as one limited to the infliction of injury at trial through the *use* of fabricated evidence to achieve a conviction, as opposed to the fabrication of the evidence itself with the intention to so use it. But this is *Respondents'* lawsuit and that is not how they formulate their claim. "[W]hether the plaintiff has alleged a deprivation of a constitutional right at all" is a matter that is addressed in a qualified immunity analysis, *see, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998), not under absolute immunity principles. Absolute immunity, as the Court made clear in *Buckley*, focuses on the nature of the civil defendant's *function* when he committed the acts of which the plaintiff complains, not whether those acts are sufficient to make out a valid claim. It is difficult to accept that this Court would have decided the absolute immunity issue in *Buckley* differently had Fitzsimmons won re-election and been able to prosecute Buckley himself with the false evidence that he had previously procured.

B. Petitioner Has Failed to Demonstrate Any Need for the Application of Absolute Immunity to Protect Prosecutors Who Assist, Advise, or Supplant Police In Fabricating Evidence During a Criminal Investigation and Then Utilize That Same Evidence to Prosecute or Convict An Innocent Criminal Defendant

1. Qualified Immunity Suffices

The concern that legitimate pre-prosecution activity by prosecutors not be over-deterred is more properly addressed by qualified immunity, which requires a plaintiff to establish not only that the prosecutor's investigative activities violated a specific, clearly-established constitutional standard of behavior, but also that no reasonable official could have believed that the prosecutor's behavior complied with such rule. Only where a plaintiff can prove that a prosecutor not only pressured or induced a prospective witness but also deliberately supplied him with, or wilfully encouraged him to adopt, a story that the prosecutor *knew* was false, will questionable "interviewing" techniques cross the qualified immunity line and subject such a prosecutor to liability for fabricating evidence during

a criminal investigation. No prosecutor need fear liability "simply for interviewing." The States of Colorado, *et al.*, Br. at 4.

There are additional practicalities of civil rights litigation that would relieve conscientious prosecutors of any reasonable fear of being sued for good-faith investigatory activities. They include pleading requirements, *see e.g. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), as well as the reality that few juries are going to believe a witness, who admits he perjured himself and blames it on the prosecutor, over the denials of the prosecutor and the police officers with whom he worked. And in the exceedingly unlikely event that the prosecutor lost the case and was held individually liable, the county or state that employed him, as *amici* point out, would almost certainly indemnify him for his damages. *See* Nat'l Ass'n of Counties, *et al.*, at 11-12, *citing Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting).

Petitioners assume it is self-evident that it is desirable to have prosecutors present to advise or assist police when they interview witnesses during an investigation, but this might surprise Harrington and McGhee, as well as the victims of the day-care center sexual abuse witch-hunts of the 1980s. *See, e.g., Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc); *Michaels v. McGrath*, 222

F.3d118, 122-23 (3d Cir. 2000), *cert. denied*, 531 U.S. 1118 (2001). Prosecutors are trained, or at least, as Justice Kennedy has pointed out, it is traditionally their function, "to examin[e] the evidence to determine whether it will be persuasive at trial and of assistance to the trial of fact," whereas it is a traditional police function to "examine[] the evidence to decide whether it provides a basis for arresting a suspect." *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part). If the facts show that all a prosecutor did was perform his traditional function of observing a police interrogation of a witness in order to evaluate the witness for possible use in the grand jury or at trial, then such prosecutor might well have absolute immunity (and qualified immunity as well) – but those are not the facts of *this* case.

This case is much closer to *Burns v. Reed*, in which the majority held that a prosecutor who provides *advice* to detectives does *not* have absolute immunity. A prosecutor who functions side by side with police trying to "solve" the crime by actively participating in fabricating evidence is, if anything, even less entitled to immunity than if he advises the police to do the same thing on their own. *See Buckley*, 509 U.S. at 275 ("After *Burns*, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an arrested suspect, but then to endow

them with absolute immunity when conducting the investigative work themselves in order to decide whether a suspect may be arrested. That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial" [footnotes omitted]).[2]

The traditional dichotomy in function between police who gather evidence and prosecutors who evaluate its usefulness for prosecution is salutary because it enhances the reliability of the evidence that prosecutors ultimately present in judicial proceedings – or at least that is the goal. The more deeply invested a prosecutor becomes in an investigation, especially an overzealous or dishonest one, the less likely will his prosecutorial review of the evidence be truly independent. A rule that an investigatory prosecutor who personally presents fabricated evidence at trial has absolute immunity

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[2] *Amici* expresses concern that some state laws command prosecutors to direct homicide investigations and sometimes, such as in financial investigations, prosecutors may conduct investigations unassisted by any government agents. *See* The States of Colorado, *et al.* Br. 6-7 & nn. 2-3. This only serves to prove that prosecutors often function indistinguishably from police detectives. That a state or municipality may elect to shift investigative responsibility to employees of a prosecutor's office is no basis to immunize all wrongful conduct that may occur.

for the fabrication, but a prosecutor who hands off the evidence to another does not, will only discourage the independent review that absolute immunity is intended to encourage and protect. It will centralize in one enormously powerful individual the police and prosecutorial functions that traditionally have been separate and eliminate a significant check on the power of the police. Such a vertical system may have its benefits, but it does not deserve to be enshrined with special constitutional status.[3]

2. Experience Since *Imbler* Proves That There Are No Effective Alternatives to § 1983 Liability for Deterring Investigative Misconduct by Prosecutors

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[3] If Petitioners are right that a prosecutor has absolute immunity for fabricating evidence that he intends to use in a criminal proceeding, because the use of it is prosecutorial, then the extension of that argument might be that police detectives who act under his direction, or with his full knowledge, would enjoy the same immunity. In the latter case, too, under Petitioners' theory, it would be the prosecutor's absolutely immunized act of using the evidence that caused the criminal defendant to be harmed, not the earlier concerted activity to create it. Thus, the insertion of a "prosecutor" to work with police during a bad-faith criminal investigation might inoculate the police against any risk of civil liability for framing an innocent man.

The "empirical" evidence upon which Petitioners and *amici* rely to establish the need for absolute immunity for prosecutors who manufacture false evidence and then use it in a criminal prosecution utterly fails to do so.

1. Petitioners' *amici* contend that permitting lawsuits against prosecutors who allegedly have fabricated evidence during criminal investigations will chill prosecutors' legitimate exercise of discretion. *See* Nat'l Ass'n of AUSAs, *et al.*, Br. 6-7. But *amici* present no persuasive evidence, indeed, virtually no evidence at all, to prove their speculation.

It is 33 years since *Imbler* left open the possibility of lawsuits against prosecutors for investigative misconduct, and 16 years since *Buckley* clearly rejected absolute immunity for such behavior, but the States' *amicus* brief, while claiming that prosecutors are "frequently" sued for investigative interviewing, cites just 11 such cases during those 33 years, while providing no information that any of them were burdensome, let alone succeeded. *See* States' Br.17-18, & n.5. Meanwhile, *amici* Counties point out that state and local governments indemnify and defend prosecutors against such lawsuits, that they are, in any event, professionals who will not be affected by remote fears of civil liability, and that therefore the threat of civil liability will have no

effect on them at all. Brief of the Nat'l Ass'n of Counties, *et al.*, at 11-13, 15.

Indeed, the main point of the *amici* briefs seems to be not that such lawsuits will succeed, for they cite statistics that civil rights lawsuits succeed far less often than traditional tort actions, see Nat'l Ass'n of AUSAs, *et al.* Br. 5 n.3, but rather that such lawsuits will deter prosecutors out of fear of being inconvenienced or distracted from their intended functions. But *amici* present *no* evidence that this has ever occurred since *Imbler* and *Buckley*. By the nature of their job, prosecutors are used to court proceedings and are naturally equipped to deal with depositions or document-production. They may employ procedural rules to oppose unduly burdensome or intrusive discovery. Moreover, in lawsuits, such as this one, that name police and others as defendants, they may be required to testify, and to disclose documents, regardless of whether they have the status of defendant or third party witness. The distraction, rare and minor as it is in relation to their other duties, occurs regardless.

Moreover, the "fear" that prosecutors will be required to explain or defend their actions years after a criminal conviction has occurred will be realized far more often during the motion and hearing practice that accompanies collateral attacks on convictions and whenever a disciplinary body conducts a truly

searching investigation of prosecutorial misconduct allegations. The rare civil rights suit that survives dismissal on qualified immunity or pleading grounds will not add much to the burden. The Court has regularly turned back similar policy arguments where prosecutors have sought blanket immunity for non-prosecutorial functions. *See, e.g., Kalina v. Fletcher*, 522 U.S. at 131 (Court "not persuaded" by prosecutors' concern about "chilling effect"); *Burns v. Reed*, 500 U.S. at 494 ("the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official's duties, but rather a concern with interference with the conduct closely related to the judicial process").

2. Petitioners' *amici* further contend, citing *Imbler*, that there is no need for a civil remedy because prosecutors who engage in investigative misconduct are subject to, and will be, disciplined by outside professional disciplinary authorities or by their own offices. *See* Nat'l Ass'n of AUSAs, *et al.* Br 8-14. Tellingly, however, they cite just six specific instances since *Imbler* in which outside investigation or discipline occurred, *see id.* at 9, 11, 11 n.5, and just three instances in which local prosecutors' offices disciplined their own employees (all of but one of which overlap with the outside discipline examples), *see id.* at 11, 13.[4] All of these cases were notorious

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[4] *Amici* also refer to the findings contained in the Department of Justice's Office of Professional Responsibility

and extreme, and most also involved additional allegations of theft or other criminal or dishonest activities. *See, e.g.*, Fred C. Zacharias, *The Professional Discipline of Prosecutors,* 79 N.C. L. Rev. 721, 755 (2001) (noting that "discipline rarely occurs unless a lawyer has committed multiple violations of the professional codes."); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275, 296 (2007) (terming the "Duke lacrosse" discipline the "Mike Nifong exception" because the "case undoubtedly has left the public with misperceptions about prosecutorial misconduct and the extent to which it is punished.") That petitioners Hrvol and Richter have not been investigated or disciplined by the Iowa attorney disciplinary committee undermines *amici's* use of Iowa's disciplinary mechanism as an

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(OPR) 2005 Annual Report as an example of regular, effective, internal discipline of prosecutors found to have committed misconduct. But there is no way of discerning from that report, based upon confidential investigations, how often – if ever – investigative misconduct is reported or how seriously it is taken. Indeed, the 2005 Annual Report does not cite any examples of investigation or discipline of prosecutors for misconduct committed during the investigative stage; the majority of disciplinary categories listed do not involve the fairness of investigations or trials. *See* U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 6. Moreover, the Justice Department appears to be unique in having an independent arm to conduct internal disciplinary reviews – *amici* cite no other examples.

example of an adequate alternative remedy for prosecutorial misconduct.

The unfortunate reality is that, regardless of a prosecutor's *theoretical* "amenability to professional discipline by an association of his peers," *Imbler v. Patchman*, 424 U.S. at 429, the discipline that the *Imbler* Court reasonably expected to occur in the wake of its decision has occurred with shocking rarity. Prosecutorial misconduct remains a substantial cause of wrongful convictions, yet the offending attorneys are virtually never disciplined.

The New York State Bar Association Task Force on Wrongful Convictions ("Task Force") recently found that prosecutorial misconduct was a substantial cause of wrongful convictions in the state, but that prosecutors rarely were disciplined, either by their own offices or by state disciplinary authorities. *See* Final Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009) ("Task Force Report"), at19, 29-31, *available at* http://www.nysba.org/Content/ Content Folders TaskForceonWrongfulConvictions/ FinalWrongfulConvictionsReport.pdf. The Task Force assembled a panel of judges, prosecutors, and defense attorneys to "identify[] the causes of wrongful convictions" and "attempt to eliminate them." Task Force Report, at 5. The Task Force studied 53 cases of wrongful convictions that were overturned by

"exoneration," and conducted hearings at which practitioners from both sides, and exonerated individuals themselves, testified. *Id.* at 5, 17. It concluded that 31 of those wrongful convictions were attributable to "governmental practices." *Id.* at 7.[5] Yet, it reported, "research has not revealed *any* public disciplinary steps against prosecutors." Task Force Report at 29 (emphasis added).

The Task Force surveyed District Attorneys in New York, 20 of whom responded to a written questionnaire, to determine "whether sanctions [for prosecutorial misconduct] had ever been imposed,"and found that just *one* prosecutor had been referred to an outside attorney disciplinary committee by these offices and just *one* prosecutor had been sanctioned internally. *Id.* at 30. Testimony the Task Force credited revealed that, despite findings by courts of prosecutorial misconduct in approximately 200 cases between the late 1970's and 2003 prosecuted in several counties, only two prosecutors in those counties had been disciplined by their own offices.[6] *Id.* at 31. Thus, the Task Force

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[5] The Task Force defined "governmental practices" to include the use of false testimony, violation of *Brady*, improper evidence retention or transfer, and refusal to investigate alternative suspects to crimes. Task Force Report, at 19.

[6] This information primarily came from evidence disclosed in civil rights lawsuits brought against the City of New York.

concluded, in a section focusing on *Brady* disclosure,"there is little or no risk to the specific individual [prosecutor] resulting from a failure to follow the [*Brady*] rule." *Id.* at 29.

In California, the Commission on the Fair Administration of Justice ("Justice Commission"), made similar findings. The Justice Commission analyzed 2,131 California cases where claims of prosecutorial misconduct had been raised. *See* Final Report, California Commission on the Fair Administration of Justice (Gerald Uelmen ed., 2008) *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf, at 71. While courts had found prosecutorial misconduct in 444 of these cases, the Justice Commission focused on 54 cases that resulted in the reversal of the conviction and which, pursuant to California Law, should have been reported to the state bar association for disciplinary investigation. *Id.* The Commission could not find a single instance where any such referral was made. *Id.* The Commission concluded that "our reliance upon the State Bar as the primary disciplinary authority is seriously hampered by underreporting." *Id.* Moreover, the Justice Commission cited no specific examples of internal discipline in those cases, or any others. *See id.* at 73-74.

A study conducted by the Chicago Tribune in 1999 found that out of 381 nationwide reversals in

homicide cases (67 of which carried death sentences) since 1963 for "using false evidence or concealing evidence suggesting innocence," only "one [prosecutor] was fired, but he appealed and was later reinstated with back pay"; "another received an in-house suspension of 30 days"; and a "third's law license was suspended for 59 days, but for other misconduct in the case." Maurice Possley & Ken Armstrong, *The Verdict: Dishonor*, Chicago Tribune, January 11, 1999, at C1 and Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, Chicago Tribune, January 11, 1999, at C1. None were disbarred or received any public sanction. *Id.*

Legal scholars and commentators agree: "prosecutors are rarely, if ever, punished" by professional disciplinary bodies, even when engaged in "egregious" misconduct. Shelby A.D. Moore, *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn To Uphold?*, 47 S. Tex. L. Rev. 801, 807 (2006). A comprehensive study of *all* reported cases across the country of professional discipline for prosecutorial misconduct found only 27 instances in which prosecutors were disciplined for unethical behavior occurring at and affecting the fairness of criminal trials.[7] Zacharias, *supra*, at 751-54, Tables

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[7] As opposed to "plainly illegal activity," such as "bribery, extortion, conversion, and embezzlement," or "allegedly abusive behavior towards tribunals, usually

VI & VII (2001). *See also*, Bennett T. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 722 (2006) ("most commentators agree that professional discipline of prosecutors is extremely rare"); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275, 276 n.7 (2004), *citing* Bennett T. Gershman, Prosecutorial Misconduct, § 14.1, n.5 (2d ed. 2001) (citing "hundreds of cases of flagrant misconduct, none of which resulted in punishment"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 718-720, 730 (1987) (finding only nine cases where professional discipline of prosecutors was sought for "*Brady*-type" violations, and only six where it was actually imposed, after conducting an exhaustive search of myriad materials, as well as surveying bar counsel in all states). *See also* Jeffrey Weeks, *No Wrong Without a Remedy*, 22 Okla. City. U. L. Rev. 833, 881 (1997) (updating Rosen's research 10 years later to add only seven additional cases where discipline was sought, and only four where it was imposed).

As persuasive as these statistics are, even more compelling are the individual reported accounts of the failure to discipline prosecutors who, either intentionally, or with cavalier disregard, obtain

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consisting of criticism of judges." *Id.* at 744-47.

convictions by violating the due process rights of the accused. Sadly, Messrs. McGhee and Harrington do not stand alone, both in the manner in which their rights were trampled and in the fact that the perpetrators in the prosecutor's office went unpunished.

Alberto Ramos, a 21-year-old college student and part-time child care worker, was convicted in 1985 of forcibly raping a five-year-old girl at the day care center where he worked. *See* Stephen Gillers, *In the Pink Room,* in 124 TriQuarterly 257 (Leigh Buchanan Bienen et al., eds., Northwestern U. Press), discussing *People v. Ramos*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994). The prosecutor deliberately concealed evidence in her file showing that Ramos almost certainly was innocent of the crime and that the crime never occurred. *Id.* Only because of discovery in a *civil* case that the child's mother brought against the New York City-funded day care center was the suppressed discovery revealed, seven years after Ramos's conviction and after he had been repeatedly beaten and sexually assaulted in prison. *See* Gillers, *supra*, at 261; *Ramos*, 614 N.Y.S. at 980. The Bronx District Attorney's Office vigorously fought Ramos's successful motion to vacate his conviction and brought a frivolous appeal that the appellate court resoundingly rejected. *See Ramos,* at 983-94. Discovery in Ramos's subsequent lawsuit against the

City of New York revealed that, out of 72 reported cases of prosecutorial misconduct, only one prosecutor, who had been named in repeated appellate reversals, was disciplined in any respect. *See* Yaroshefsky, *supra*, at 281-82 (noting that the prosecutor was "suspended for four weeks and lost two weeks pay," and on his return was immediately granted a bonus and a series of merit increases). As for Ramos's prosecutor, even though both the trial and appellate courts found, at the very least, that she had handled Ramos's case in a "cavalier and haphazard" manner, *People v. Ramos*, No. 3280/08, Slip. Op. at 8 (N.Y. Sup. Ct. June 1, 1992), *aff'd*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994), the New York State attorney disciplinary committee failed to institute any professional sanctions -- not even a private reprimand. Yaroshefsky, *supra*, at 281 n.26. *See also Ramos v. City of New York*, 729 N.Y.S.2d 678, 682 (N.Y. App. Div. 1st Dept. 2001) (conduct in *Ramos* prosecution was "far astray" from "diligence," calling "good faith," and "even honesty," into question). The disciplinary committee conducted a secret interview of the prosecutor and "closed the investigation without affording Ramos or his counsel any notice or opportunity to be heard." *Id.* at 281 n. 27.

Similarly, no professional discipline was meted out in the troubling case of Delma Banks. *See Banks v. Dretke*, 540 U.S. 668 (2004). This Court reversed

and remanded Banks's capital murder sentence based on the Texas prosecutors' withholding of evidence undermining key witnesses' credibility at trial, their knowing failure to correct false testimony, and their false and/or misleading argument to the jury. *Id.* at 675-76. Banks' prosecutors continued to "hold secret [] key witnesses' links to police and allowed their false statements to stand uncorrected" throughout direct appellate and collateral review proceedings. *Id.* at 675. In all, Banks spent 24 years on death row. *See* Moore, *supra*, at 804. The prosecutors' misconduct in this well-known case could not have been a secret to the Texas professional disciplinary authorities, yet there is no record on file of any discipline of the prosecutors involved, and "it is unlikely the prosecutors will ever be punished for violating Mr. Bank's constitutional rights." *Id.*

Discovery obtained in another civil rights lawsuit, *Shih-Wei Su v. City of New York*, No. 06 Civ. 687 (E.D.N.Y. 2006), revealed that, out of 84 reported cases in Queens, New York, between 1989 and 2003 overturning convictions based on prosecutorial misconduct, not one prosecutor was disciplined either externally or internally. *See* Letter to the Court, dated July 24, 2008, *Su v. City of New York, supra*, Docket No. 111 (Jul. 24, 2008), *available at*, https://ecf.nyed.uscourts.gov/cgi-bin/iquery.pl?100207525478475-L_665_0-1. The prosecutors who escaped discipline included Su's, notwithstanding

Second Circuit Judge Calabresi's conclusion that this prosecutor had "knowingly elicited false testimony from a crucial witness." *Su v. Filion*, 335 F.3d 119, 121 (2d Cir. 2003). One of the cases relied upon by *Su* in his civil lawsuit, *People v. Steadman*, 623 N.E.2d 509 (N.Y. 1993), involved a high-level prosecutor's deliberate creation of an elaborate wall to "'shield' the trial assistants'" from knowledge of his secret promise of leniency to the principal prosecution witness's attorney. 623 N.E.2d at 511-12. The prosecutor was not disciplined despite the finding of New York's highest court that he had made a "determined effort to avoid [] accepted standards of conduct" under state law requiring disclosure of *quid pro quo* deals with witnesses. *Id.*

The lack of prosecutorial discipline may be attributable to an overarching institutional failure of both professional disciplinary committees and individual prosecutors' offices to establish effective procedures to investigate allegations of misconduct.

"Disciplinary authorities have limited resources to prosecute violations of the professional rules." Zacharias, *supra*, at 756 (2001). Properly investigating such claims, particularly if the misconduct occurred during the investigative stage of a case, involves reconstructing events that often occurred several years prior, where little "hard" evidence exists. But most disciplinary committees

function as reactive bodies, making them very effective for sanctioning an attorney who bounced an escrow check, but far less so for determining whether a prosecutor coached a witness to lie under oath. They may be reluctant to take seriously complaints by criminal defendants. *See* Rosen, *supra*, 733-35. Bar disciplinary authorities in many jurisdictions are controlled by the judicial branch and thus "separation-of-powers concerns can also make bar authorities hesitate to intrude on the prosecutor's province." Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Penn. L. Rev. 101, 119-120 (forthcoming 2009), *available at*, http://ssrn.com/abstract=1313215), *citing* Zacharias, *supra*, at 761.

Furthermore, even if professional disciplinary authorities had the administrative capability of meaningfully investigating a significant number of allegations of prosecutorial misconduct, they would still be handicapped by the absence in most states of specific provisions governing prosecutors' pre-charging conduct as investigators. *See, e.g.*, Model Rules of Professional Responsibility, Rule 3.8 (2009) (adopted in some form in most states) (setting forth the "Special Responsibilities of a Prosecutor" relating to the initiation and the conduct of criminal proceedings, but containing no provisions addressing a prosecutor's ethical responsibilities in investigating a case before filing charges); Davis, *supra*, at 284

(noting that Model Rule 3.8 "fails to address" prosecutors' "relations with the police and other law enforcement officers"). Thus, as Zacharias pointed out, "many of the rules of professional conduct [] are blunt instruments — altogether inapplicable, or barely applicable, to full-time prosecutors." Zacharias, *supra*, at 725.

While individual prosecutor's offices, unlike outside bar committees, may have the resources or the knowledge to investigate or discipline, they have not demonstrated the will. Although *amici* argue that prosecutors' offices "often" have internal mechanisms for discipline, Nat'l Ass'n of AUSAs, *et al.* Br. 8, they cite no specific examples other than the Department of Justice's Office of Professional Responsibility. And compelling evidence suggests otherwise. The New York Task Force and the California Justice Commission both found that prosecutors' offices in their respective states lacked consistent or transparent internal policies or procedures for attorney discipline. *See* Task Force Report, at 30; Justice Commission Report, at 73-74. In California, the Justice Commission found a "complete lack of transparency of internal discipline procedures" within state prosecutors' offices, which created a lack of accountability for individuals accused of misconduct. Justice Report, at 73-74. *Amicus* Cook County describes the substantial involvement its prosecutors have in the investigation

of criminal cases, *see* Cook County Br. 5-6, 21-22, but nowhere mentions any procedure for or history of disciplining attorneys for misconduct. When the Chicago Tribune attempted to find out how often Cook County prosecutors are internally disciplined for prosecutorial misconduct, it could not find any instances of prosecutors facing dismissal for misconduct from 1980-1999, even though the Tribune found "trial after trial where prosecutors cheated, lied or spun out of control during arguments before a jury." Possley & Armstrong, *The Flip Side of a Fair Trial*, *supra*.

Finally, *Imbler's* theoretical observation that prosecutors are more amenable to discipline than other state actors, such as police, therefore reducing the need for prosecutorial accountability under § 1983, unfortunately has not proven true in practice. Police officers are subject to internal and external discipline to a far greater extent than most prosecutors. Internally, most police departments have "internal affairs" bureaus comprised of officers assigned to investigate and prosecute crimes committed by their own. In addition, municipalities in 26 states, and Washington, D.C., have civilian review boards that operate outside of the police department to investigate allegations of police misconduct and make recommendations for remedial actions. *See* Police Assessment Resource Center, List of Oversight Agencies, *available at*

http://www.parc.info/oversight_agencies.chtml (listing police oversight agencies by state). Independent investigators, who interview witnesses, gather evidence, and review court documents and transcripts in order to make factual findings, staff many of these civilian review boards. However, there appear to be no disciplinary boards anywhere dedicated to investigating prosecutorial misconduct allegations. Thus, the possibility of outside discipline does not suggest the conclusion that prosecutors should receive more favorable treatment than police for performing the same function. *Buckley*'s refusal to extend absolute immunity to functions that are not uniquely prosecutorial, but are routinely performed by police officers, continues to make sense.

3. Petitioners' *amici* argue that prosecutors are deterred from committing misconduct by the threat of sanctions or reversals by trial or appellate court judges. Nat'l Ass'n of AUSAs, *et al.*, Br. 14. One would hope that this were true, but there is no empirical evidence for it; to the contrary. *Amici* themselves cite the troubling statistic that 16 per cent of all capital cases are reversed on appeal for prosecutorial misconduct, which tends to prove that prosecutors are *not* sufficiently deterred. *Id.* at 14 n.7, *citing* James S. Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases* (2000).

Many prosecutors responsible for misconduct found by courts are "repeat offenders." The California Justice Commission identified 30 such offenders, out of 347 reported decisions of prosecutorial misconduct; two-thirds of these prosecutors committed the same offense more than once. Justice Commission Report, at 74. *See also* Andrea Elliot, *Prosecutors Not Penalized, Lawyer Says*, N.Y. Times, December 17, 2003, at B1 (14 out of 74 Bronx prosecutors found by judges to have committed misconduct were cited in "several cases").

The "horizontal" structure of many prosecutors' offices, in which different attorneys handle trials and appeals, the high rate of turnover in prosecutors' offices, and the fact that few court decisions mention the prosecutor's name, diminish deterrence. *See generally* Zacharias, *supra*, at 770. *See also* Yaroshefsky, *supra*, at 291 ("judicial oversight is unlikely to provide a remedy in most cases").

4. The Solicitor General surprisingly contends that other civil remedies provide just compensation for virtually all victims of prosecutorial misconduct. *See* S.G. Br. 29-33. Yet only 25 states, Washington, D.C., and the federal government have statutes under which the wrongfully convicted may claim compensation. Almost all of these statutes contain substantial barriers to recovery. *See* Howard S. Masters, *Revisiting the Takings-Based Argument*

for Compensating the Wrongfully Convicted, 60 N.Y.U. Ann. Surv. Am. L. 97, 108 (2004-2005) ("most existing compensation statutes require wrongfully convicted individuals to surmount onerous obstacles in order to be eligible for compensation").

In almost all cases, unjust conviction statutes require that, in order to recover, the individual seeking compensation must affirmatively prove his or her innocence of the underlying crime.[8] Moreover, many states impose the further requirement that a claimant show that he or she "did not, by any act or omission on his part, either intentionally or negligently contribute to bringing about his arrest or conviction." *See e.g.* CA PENAL § 4900-4906; N.J. STAT. ANN. § 52:4C-I; W.VA. CODE ANN. § 14-2-13a; WIS. STAT. ANN. § 775.05. This provision often "denies justice to those who were coerced, explicitly or implicitly, into confessing or pleading guilty to crimes it was proven they did not commit." *See* Innocence Project, *Compensating the Wrongfully*

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[8] *See, e.g.*, ME. REV. STAT. ANN. tit. 14 MSRA § 8241 (claimant must receive a written finding from the Governor stating that the person is innocent of the crime for which her or she was convicted); 705 Ill. Comp. Stat. 505/8(c) (same); MD CODE ANN. STATE & FIN. PROC. § 10-501(b) (same); N.C. GEN. STAT. § 148-82 (same); TEX. CIV. PRAC. & REM. ANN. § 103.001(4) (same). *See also* N.Y. CT. CL. ACT § 8-b (claimant must prove innocence by "clear and convincing evidence"); IOWA CODE ANN. ICA § 663A.1 (same); LA REV. STAT. ANN. §15:572.8 (same); N.J. STAT. ANN. § 52:4C-1 (same).

Convicted Fact Sheet, available at http://www.innocenceproject.org/Content/309.php. Finally, many statutes limit recovery to individuals whose convictions were vacated on certain statutory grounds, "consistent with innocence," *see e.g.* N.Y. CT. CL. ACT § 8-b, which may preclude cases where courts vacated convictions based on prosecutorial misconduct.

For example, New York woman Betty Tyson spent 25 years in prison before her conviction was vacated based on a finding that her trial prosecutor withheld exculpatory evidence. *See Tyson v. State*, 698 N.Y.S.2d 410, 415-16 (N.Y. Ct. Cl. 1999). The Court of Claims dismissed her claim for compensation, finding that the legislature had "placed a high threshold upon those seeking recompense under this statute,"and thus, "there can be no recovery here, and no opportunity for her to prove her innocence, perhaps her ultimate goal." *Id.* The indifference of such statutes to constitutional violations makes them a wholly inadequate substitutes for § 1983.

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Petitioners' *amici* agree with us on principle: "There should be serious consequences for prosecutors whose misconduct deprives a criminal

defendant of his or her constitutional rights." *See* Nat'l Ass'n of AUSAs, *et al.* Br. 16. But at present, and since *Imbler*, experience has shown that this rarely is the case. The handful of times it has occurred is no basis to deny relief pursuant to 1983, and will only encourage, rather than deter, such misconduct in the future.

II. PETITIONERS DO NOT ENJOY QUALIFIED IMMUNITY FOR FABRICATING EVIDENCE DURING THE INVESTIGATIVE STAGE MERELY BECAUSE THEY, INSTEAD OF ANOTHER PROSECUTOR, PRESENTED THAT EVIDENCE AT TRIAL

Petitioners and *amici* concede that a police detective may be sued under § 1983 for fabricating false evidence and causing it to be used to frame an innocent man in a criminal prosecution, and so may an investigating prosecutor – so long as the prosecutor hands off the evidence to a colleague but does not use it himself. *See* Pets. Br. 27, SG Br. 32 Thus, under Petitioners' theory, Hrvol and Richter would have been liable for their investigative misconduct had their tainted evidence been handed to another prosecutor who then became the instrumentality of their scheme. Instead, Petitioners contend, in effect, that Hrvol protected himself from

suit by soliciting or accepting the prosecutorial assignment and using the evidence himself.[9]

We agree with Respondents that this cannot be the law. As Judge Newman concluded in *Zahrey v. Coffey*, 221 F.3d 342, 353 (2d Cir. 2000): "It would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty."

Petitioners argue that an investigatory prosecutor is not liable for "merely" fabricating evidence because no one is harmed by the fabrication of evidence that is then locked away in a desk drawer. But this evidence *was* used. That it *could* have been buried (but was not) must not be permitted to obscure that it was employed to destroy the lives of two innocent 16-year-olds, just as petitioners had every reason to anticipate when they created it.

Petitioners argue that the "only" injury inflicted here was Respondents' conviction at trial, without which their due process rights were not violated, but this argument cannot be right. The

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[9] Richter had a minor role at trial that did not directly involve presenting the fabricated evidence, and petitioners do not clearly articulate his claim for immunity.

fabricated evidence was used as the basis to arrest them, to indict them, to detain them in lieu of bail, to defame them in the community where they had grown up, to pressure them to accept a plea bargain, to make them stand trial, to avoid dismissal of the charges at the end of that trial, to force them to endure the unimaginable anxiety of awaiting the jury's verdict, and then to convict them. Had this been a death penalty case, they might long ago have been put to death.

Criminal defendants, the innocent as well as the guilty, face intense pressure to accept plea bargains in lieu of the harsh sentences that are regularly meted out under mandatory or even discretionary sentencing statutes to defendants who go to trial and lose; thus, 95 out of 100 convicted criminal defendants plead guilty.[10] A defendant may feel compelled to accept a plea offer, despite being innocent, without any meaningful information about the identity or the credibility of an informant making the allegation against him, let alone any possibility

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[10] *See* Admin. Office. Of the U.S. Courts. 2007 Annual Report of the Director: Judicial Business of the United States Courts tbl. D-7 (2008), *available at* http://www.uscourts.gov/judbus2007/appendices/D07Sep07.pdf (out of 78,861 defendants convicted in 2007, 75,949 pleaded guilty); Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, *Felony Sentences in State Courts 2004*, Bureau of Justice Statistics Bull. (July 2007), at 1 ("95% of convicted felons pleaded guilty").

of uncovering that investigators acted improperly to cause such witness to manufacture a false allegation. *See, e.g.*, 18 U.S.C. § 3500 (government not required to disclose prior witness statements until the beginning of trial); *United States v. Ruiz*, 536 U.S. 622 (2002) (impeachment material not constitutionally required to be disclosed prior to a guilty plea). In the rare case where such misconduct is discovered, it is usually by pure fluke. *See, e.g., People v. Ramos*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994).

Surely due process is offended by the fabrication of evidence that results in a false guilty plea, just as surely as a false jury conviction. "The greatest crime of all in a civilized society is an unjust conviction," wrote the hearing court in *Ramos*. "It is truly a scandal which reflects unfavorably on all participants in the criminal justice system." *People v. Ramos*, 614 N.Y.S.2d at 984. Yet, under Petitioners' formulation, the prosecutor who fabricates evidence and then uses it to coerce an innocent man's guilty plea does not just commit an unconstitutional act for which he is immunized; he commits no constitutional wrong at all.

CONCLUSION

For the foregoing reasons, and for the compelling reasons set forth in Respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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